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CURRENT TOPICS.

It is very seldom we obtain such a valuable contribution to the subject of constitutional law, as the recent decision of the United States Circuit Court for the Western District of Tennessee, in Louisville, etc. R. Co. v. Railroad Commisssoners. The legislature of Tennessee, by chapter 199 of the act of March 30, 1883, sought to prevent unjust discrimination by the railroads of that State, and provided that the exaction of unjust and unreasonable compensation for transportation should render the carrier liable to criminal prosecution. It exempted from the operation of the act all railroads then in process of construction, and thereafter to be constructed within ten years. The court (Baxter, Hammond and Key, J. J.) hold that the act is unconstitutional, (1) because the act makes it penal to take "unjust and unreasonable compensation," but provides no proper method by which the injustice or unreasonableness of their exactions may be with uniformity ascertained; that it leaves the determination of the guilt of the companies to the arbitary judgment of the jury; that in one case the jury may convict the company, and in another case, upon the same facts, acquit it; that a law which is productive of such incongruities, is not sufficiently definite to meet the requirement of those provisions of the Constitution, which are designed to protect the citizens of the State. It holds (2) that the act in exempting companies then in existence or to come into existence from its operation, extended to them special rights thus violating that provision of the Constitution which secures to every one equal rights. The great point of the case lays, however, in the holding of the court that the act was a regulation of inter-State Commerce, and therefore void. Judge Hammond devotes his attention to this phase of the case, while Judge Baxter dwelt upon the other points. Judge Hammond's opinion is very lengthy and exhaustive and we must content ourselves with the syllabus which we are led to believe was prepared by the learned judge.

1. The act of the Tennessee Legislature, approved March 30, 1883, chapter 199, entitled; "An act to provide for the regulation of railroad companies and persons operating railroads in this State: to prevent discrimination upon railroads in this State, and to provide for the punishment of the same, and to appoint a Railroad Commission," is invalid so far as it applies to the plaintiffs in these cases, because it is a regulation of inter-State commerce, acting directly, by a control of the rates of compensation, upon the transportation of persons and commodities in transit from one State into another. The States have surrendered the power to do this by the Federal Constitution, article 1, section 8, which confers on Congress the exclusive power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

2. The power of the States to regulate railroad rates by such direct action is limited to domestic transportation, which means that carried on exclusively within the boundaries of a state, and transportation can be domestic only when it begins and ends within those boundaries; and this definition can not, for the purpose of enlarging State authority, be held to include so much of a transportation on a continuous shipment between two or more States as will cover the distance travelled within the limit of any one of those States: for this construction would utterly destroy the exclusive power of Congress over the inter-State transportation, abrogate the constitutional provision and enable the States to restrict, obstruct or impair that freedom of commerce between the States which it was the object of the provision to permanently secure. It can only include the transportation carried on upon roads lying wholly within the State, or else, it may be, to shipments beginning and ending in the State without reference to the character of the road in that regard. This is the utmost reach of State power, and as to this, no decision is now made, because the act itself makes no discrimination, and attempts to control all rates.

3. Until Congress chooses to exercise whatever power it may have over domestic commerce, as above described, by reason of whatever relation it may bear to inter-State commerce as an auxiliary or instrumentality thereof, the States may continue their control over it as over any other such instrumentality within their territorial limits, although the inter-State commerce of which it is an instrumentality may be indirectly or incidentally affected by such control, but they can never touch the inter-State commerce itself by direct action upon it or any part of it, by these regulations, and any State law, be it wise or unwise, valid or invalid in other respects and no matter what its character or the necessity for such a law may be, which acts upon the contracts for inter-State transportation between the carrier and shipper to regulate the charges for it, or any part of it, or the conditions thereof in any respect, operates directly on the commerce itself, of which the transportation is certainly a part and not on an instrumentality of it. These distinctions must be observed in legislation, and that which neglects or overlooks them, or assumes to disregard them, is necessarily invalid. And the courts can not cure the defect by supplying through judicial decree the necessary qualifications to conform the legislation to constitutional limitations.

4. It is as impossible for a State to make a regulation of inter-State commerce by the exercise of its power over the corporations of its creation, as by any

other power, if it permits them to engage in inter-State commerce. Possibly, it may bind the corporations permitted to engage in inter-State commerce to schedules of rates agreed upon by them; but this is binding only by force of the contract of the carrier to be so bound and not as a regulation of the rates under any municipal power of the States over the commerce. A regulation of inter-State commerce as such is as invalid in a charter as elsewhere in a State statute.

5. The Louisville & Nashville Railroad Company, being a Kentucky corporation, was authorized by license of the laws of Tennessee to extend its road into that State; and subsequently, by laws passed for the purpose, to consolidate with other railroad companies and thereby became an extensive system of intercommunication between the States from the Ohio river to the Gulf of Mexico. The East Tennessee, Virginia & Georgia Railroad Comnany, a Tennessee corporation, by authority of law became a consolidated corporation operating a system of railroads between the States and extending through Tennessee into Georgia, Alabama and Mississippi, forming with its connections a united line of inter-communication, traversing North and South Carolina, Virginia and other States; *held*, that an act of the Legislature which attempts to control the rates for fares and freights of persons and commodities passing over these roads from one State into another, on the theory of regulating the charges for the distances traveled within the State of Tennessee, is invalid as a regulation of inter-State commerce, and the Railroad Commissioners will be enjoined from executing it as to these roads.

NOTE.—The cases reviewed by the learned judge are People v. Wabash R. Co., 104 Ill. 476; s. c. 105 Ill. 236; Hall v. De Cuir, 95 U. S. 485; Railroad Co. v. Husen, Id. 465; Carton v. Illinois Central R. Co., 59 Iowa 148, 153; s. c. 22 Am. L. Reg. 373; Pick v. Railroad Co., 6 Bissel, 177; Freight Tax Cases, 15 Wall. 232; Attorney General v. Railroad Co., 35 Wis. 424, 449, 453, 470, 478, 484, 485, 511; Louisville R. Co. v. Henry County (unreported); Callahan v. Louisville R. Co., 11 Fed Rep. 536; Daniel v. Ball, 10 Wall. 557; Montello Case, 11 Wall, 441; s. c. 20 Id. 439; Welton v. Missouri, 91 U. S. 275, 282; Mobile v. Kimball, 102 U. S. 691, 702; State Tax Gross Receipts Case, 15 Wall. 284; Memphis & Little Rock R. Co. v. Nolan, 14 Fed. Rep. 532; People v. Comp. Gen., Transatlantique, 107 U. S. 59; Telegraph Cases, 96 U. S. 1; Gray v. Clinton Bridge, 7 Am. L. Reg. N. S. 149; Keiser v. Illinois Central R. Co., 18 Fed. Rep. 151; Tilley v. Railroad Commissioners, 4 Woods, 427; s. c. 5 Fed. Rep. 641; *In re* Boyer, (to appear in 109 U. S.). The B. & C. 18 Fed. Rep. 543; Escanaba Co. v. Chicago, 107 U. S. 678; The Lottawanna, 21 Wall. 558; The Illinois 2 Flip. 383, 4 Southern Law Rev. (N. S.) 357, 7 Id. 377, 3 Id. (O. S.) 656; 13 Am. Law Reg. (N. S.) 1, 185; 23 Id. 81; 12 West Jur. 17; 12 Cent. L. J. 194; Pierce v. Railroad, 468; Gibbons v. Ogden, 9 Wh. 1 Brown v. Maryland, 12 Wh. 419. Cooley's Constitutional Limitations (4th Ed.) 214, 219, Packet Co. v. Keokuk, 95 U. S. 80; Neely v. State, 4 Bax. 174. The learned judge appends a note to the case in which he asks the reader to consult Turner v. Maryland, 107 United States, 38; People v. Comp-General Trans-Atlantique. Ibid, 59; Wiggins v. East St. Louis, id., 365; Transportation Company v. Parkersburg, id., 691 Telegraph Company v. Texas. 105 United States, 460; Bridge Company v. United States. id., 470; Packet Company v. Catlettsburg, Ibid., 559; Webber v. Virginia, 103 United States, 344; Tiernan v. Rinker, 102 United States, 123; Lord v. Steamship Company, id., 541, Vicksburg v. Tobin, 100 United States, 430; Packet Company v. St. Louis, id., 423; Guy v. Baltimore, id., 423; Machine Company v. Gage, id., 676; Trade Mark Cases. id., 82; Transportation Company v. Wheeling, 99 United States, 273; Beer Company v. Massachusetts, 97 United States, 25; Cook v. Pennsylvania, Ibid, 566; The Telegraph Case, 96 United States, 1.

One of the qnestions upon which there has been serious controversy in this country, with some diversity of judicial opinion has been whether a judgment upon a debt bearing a conventional rate of interest continues to bear the stipulated rate or the legal rate only. We once reveiwed this question elaborately (17 Cent. L. J. 125) and pointed out the various courts which had placed themselves upon either side of the question, and that the better view and certainly that sustained by the weight of authority was that the judgment should bear the legal rate only. The recent decision of the English Court of Appeal in *ex parte* Fewings, 32 W. R. 352 adds one more strong case to the line of authorities in the majority. A mortgage provided that the mortgage debt should bear a certain rate of interest "until paid." The court held that the judgment merged the debt and after its rendition the legal rate only was recoverable.

In connection with the recent decision in Eppright v. Nickerson 18 Cent. L. J. 130, it would be well to note to the still more recent decision of the Supreme Court of Nevada in McKelvey v. Crockett (2 West Coast Rep. 37) in which it is held that a stockholder cannot be held as a garnishee for the debts of the corporation to the extent of his unpaid and uncalled subscription to its stock. It would be hardly fair to claim that the cases conflict, but they will bear comparison. The court cites Bingham v. Rushing, 5 Ala. 405. Brown v. Union Ins. Co. 3 La. Ann. 177, 182, 183, Faul v. Alaska, G. & S. M. Co. 14 Fed. 657. In Re Glen Iron Works, 17 Fed. Rep. 324; s. c. 10 Phila. 479. Sawyer v. Hoag, 17 Wall. 610.

FOREIGN JUDGMENTS.

Is a properly certified or duly proven judgment in the court of a foreign country or State, conclusive as between the parties when there has been a trial upon the merits, and there is no fraud or imposition, or want of jurisdiction, or mistake shown, or offered to be shown? Is it only *prima facie* evidence? Or must the case be re-tried upon its merits before the new tribunal in another action between the parties? The object of this article is to answer these questions.

Much discussion, and not a little contrariety of decision has obtained both in England and this country relative to the conclusiveness of a judgment obtained in a foreign country, when sued upon in the courts of England and this country. In England the rule is now firmly settled that the judgment of a foreign court is conclusive so far as to preclude a re-trial of the cause upon its merits, when the defendant resided within the territorial jurisdiction of the court rendering the judgment, and the cause was one over which it had jurisdiction, or such defendant by some act submitted himself to the jurisdiction of the court.[1]

Formerly foreign judgments were regarded in England as merely *prima facie* evidence of a debt or demand;[2] but the recent English cases hold them to be conclusive.[3] The defendant, however, is always permitted to show that the foreign court had no jurisdiction of the action, that he was never served with process, or that the judgment was fraudulently obtained where either is true.[4]

In the early cases in this country, the courts manifest a disposition to follow the early English rule, that foreign judgments are only *prima facie* evidence, and not conclusive;[5] but since Lazier v. Westcott,[6] the preponderance of opinion is the other way.

The later English rule was early laid down by Justice Kent in Taylor v. Bryden,[7] and in Monroe v. Douglas,[8] it is said to be a well-settled principle in countries where the common law prevails, that where the matter in controversy is land, or other immovable property, a judgment pronounced in the *forum rei sitæ*, is an universal obligation as to all the matters of right and title which it professes to decide in relation thereto, and is absolutely conclusive. It is further held in this case that in whatever place the proceeds arising from the sale of such property may afterwards be found, such judgment being *in rem*, will be equally conclusive, by whomsoever the title thereto may be questioned, and whether it be directly, or incidentally, brought in controversy.[9] The court say, respecting the conclusiveness of the judgment of foreign courts generally, that when such judgment is produced in evidence, and appears to be regular in form, and to contain the essential facts of an adjudication of the controversy between the parties, the burden of showing invalidity rests upon the party who desires to impeach it, and that he can only show, in contesting its validity, that it was procured by fraud, or that it was void on its face, or void by the local law, *fori judicatæ*.[10]

It is now well settled that where a court has jurisdiction, it has a right to decide every question which occurs in the case, and whether its decision be correct or otherwise, its judgment, until reversed by a court of appellate jurisdiction, is regarded as binding in every other country.[11] And such a judgment in one State or country is a bar to an action in another State or country on the same subject-matter, between the same parties, although the forms of action be different.[12]

[1] Schilerby v. Westenhalz, L. R. 6 Q. B. 155; Warren v. Kingsmill, 8 Upper Canada, Q. B. 407; Burn v. Bletcher, 23 Id. 28; Freeman on Judgments, sec. 588.

[2] Gailbraith v. Neville, Doug. (3d ed.) p. 5 and note; s. c., 5 East, 475; Phillips v. Hunter, 2 H. Bl. 410.

[3] Tarleton v. Tarleton, 4 M. & S. 20; Goddard v. Gray, L. R. 6 Q. B. 139; Costrique v. Imrie, L. R. 4 H. L. 44.

[4] Henderson v. Henderson, 6 C. B. 288; Ferguson v. Mahen, 11 Ad. & El. 179; Ricardo v. Garcias, 12 Cl. & Fin. 368; Bank of Australia v. Nias, 4 Eng. L. & Eq. 252; Martin v. Nichols, 3 Simmons, 458.

[5] Butterick v. Allen, 8 Mass. 273; s. c., 5 Am. Dec. 105; Williams v. Preston, 3 J. J. Marsh. 600; s. c., 20 Am. Dec. 179.

[6] 26 N. Y. 152; Baker v. Palmer, 83 Ill. 569.

[7] 8 Johns., 173.

[8] 4 Sandf. Ch. 126, 179.

[9] See Story's Conflict of Laws, secs. 591-593, and 549 and note; 3 Burge's Commentaries on Colonial and Foreign Laws, 1015, 1062-3, 1066.

[10] Lazier v. Westcott, 26 N. Y. 152.

[11] Guthrie v. Lowry, 84 Pa. St. 537; Elliott v. Piersol, 1 Pet. 238, 240.

[12] Bank of United States v. Merchants' Bank, 7 Gill. 415; Whitehurst v. Rogers, 38 Md. 502-515; Harryman v. Roberts (Md.), 20 Am. L. Reg. 375; 2 Am. Lead. Cases, 617.

Want of jurisdiction over the cause of action, or of the person or property of the defendant, renders the judgment of a court of a foreign State or country a nullity.[13] Hence the jurisdiction of the court rendering the judgment is always open to investigation, and it may at any time be shown that the trial court either exceeded its jurisdiction or never acquired it over the parties by due service of process, or otherwise, and in either event the proceedings were *coram non judice*, and the judgment void.[14]

In Harris v. Hardman, above cited, the court say: "In the case of Starbuck v. Murray,[15] the Supreme Court of New York say, 'the courts of Connecticut, Pennsylvania, New Hampshire, New Jersey and Kentucky have all decided that the court rendering a judgment may be inquired into when suit is brought in the courts of another State, on that judgment;' and, citing numerous cases,[16] say: 'This doctrine does not depend merely upon adjudged cases; it has a better foundation; it rests upon a principle of natural justice. No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence, without the privilege of showing, if he can, the claim against him to be fraudulent.'"

"'But it is contended that if the matter may be pleaded by the defendant, he is estopped from asserting anything against the allegations contained in the record. It imports perfect verity, it is said, and the parties to it can not be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore that the supposed record is, in truth, no record. If the defendant did not have proper notice of, and did not appear in the original action; all the State courts, with one exception, agree in opinion that the paper introduced, as to him, is no record; but if he can not show, even against the pretended record, that fact, on the alleged ground of the unconstitutionalty of the record, he is deprived of his defense by a process of reasoning that, to my mind, is little less than sophistry. The plaintiffs, in effect, say to the defendant: 'The paper declared on is a record, because it says you appeared, and you appeared because the paper is a record.'"[17]

Justice Sharswood said, in Guthrie v. Lowry,[18] that it is an incontrovertible proposition that in an action upon a judgment of the court of a sister State, the record may be contradicted by evidence of facts impeaching the jurisdiction of the court by which the judgment was rendered.[19]

In order to secure to the trial court jurisdiction of the person of the defendant, he must be duly served with process within the territorial jurisdiction of the court, unless he voluntarily appears in the action.[20] Want of proper service renders the judgment a nullity;[21] the judgment of a foreign court being void, unless the defendant defended, or was offered an opportunity to defend.[22]

Neither the constitutional provision that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevent an inquiry into the jurisdiction of court by which the judgment was rendered.[23]

[13] Shepard v. Wright, 59 How. Pr. 512; Kerr v. Kerr, 41 N. Y. 272, 275.

[14] Dabson v. Pearce, 2 Kernan, 165; Marx v. Fore, 51 Mo. 75; s. c., 11 Am. Rep. 432; Christmas v. Russell, 5 Wall. 305; Harris v. Hardman, 14 How. (U. S.) 434; Starbuck v. Murray, 5 Wend. 156; Kerr v. Kerr, 41 N. Y. 272; Rape v. Heaton, 9 Wis. 328; Pollard v. Baldwin, 22 Iowa, 328.

[15] 5 Wend. 156. See also Holbrook v. Murray, Ib. 161, and Denning v. Carwin, 11 Id. 648.

[16] Thurber v. Blackburn, 1 N. H. 246; Benton v. Bengot, 10 Serg. & R. 240; Aldrich v. Henny, 4 Ct. 280.

[17] Marx v. Fore, 51 Mo. 75-76; s. c., 11 Am. Rep. 432.

[18] 84 Pa. St., 537.

[19] See Williamson v. Berry, 8 How. 540; Thompson v. Whitman, 18 Wall. 457; Knowles v. Gaslight & Coke Co., 19 Id. 59; Hill v. Mendenhall, 21 Id. 453; Noble v. Thompson Oil Co., 29 P. F. Smith, 354.

[20] Holmes v. Holmes, 4 Lans. 392; Dunn v. Dunn, 4 Paige, 425; *Ex parte* Green, 10 Wend. 592; Folger v. Columbia Ins. Co., 99 Mass. 267; Shepard v. Wright, 59 How. Pr. 515.

[21] Shumway v. Stillman, 4 Cow. 272; Borden v. Fitch, 15 Johns. 121; Noyes v. Butler, 6 Barb. 613; Bradshaw v. Heath, 13 Wend. 407.

[22] Kerr v. Condy, 9 Bush. 372, Cone v. Cotton, 2 Blackf. 82; Snyder v. Snyder, 25 Ind. 397; Rope v. Heaton, 9 Wis. 332.

[23] Thompson v. Whitman, 18 Wall. 457. See Rose v. Hinley, 4 Cranch, 269; Story on Constitution, sec. 1313; Story on Conflict of Laws, sec. 609; 1 Kent, 261; 2 Id. 95, note and cases cited.

Though each State is required to give full "faith and credit" to the acts, records, etc., of sister States, yet there is nothing which imposes upon them the duty of giving "force and effect" to the judgments of the courts of sister States. It is a well-established principle of international law that the judgments of a State or country, where properly obtained, are entitled to respect everywhere; yet by this principle the courts of one nation are not required to enforce the judgments of another. It is a well-settled doctrine that, as a rule, judgments have no extra-territorial force, and in other jurisdictions they are, at most, but evidence of a settled demand, upon which a judgment must be obtained before there can be process issued for its enforcement, because where relief is to be given upon foreign judgments, it must be given according to the local law and local judicial practice or method of procedure of the jurisdiction where the process of enforcement is desired.[24]

Judge Cooley says that "faith and credit" is one thing, but "force and effect" quite another; and that a judgment may be entitled to faith and credit everywhere, and yet outside of the State where it was rendered be of no force or effect whatever. Some judgments, from their nature, must spend their force within the State; as where they provide for the performance of some local act; others, for other reasons, may not be enforcible elsewhere. And sometimes, as has been intimated, it may appear that the jurisdiction of the court rendering them was insufficient for any purpose of affirmative relief elsewhere." [25]

Where a judgment is for the payment of money only, without conditions, it may be enforced in another jurisdiction after judgment for that purpose properly obtained; but where there are conditions added, or where the judgment is for the performance of some personal act, such as the delivery of goods, the transfer of corporate stocks, and the like, Judge Cooley says that, usually, when such judgments have conditions affixed, those conditions are dependent upon local laws, and that the local laws can not be taken with the judgment into a foreign court. The judgment of a court in one State requiring the transfer of real estate, can not be enforced in another State; [26] neither will a judgment in the alternative be so enforced; [27] nor one for the discharge of a penal bond by the payment of a less sum than the face of the bond in instalments.[28]

The doctrine that the judgment of a court of record in a sister state, where the parties appear, or are duly summoned, imports absolute verity is well settled; but yet this does not prevent judgments, whether foreign or domestic, from being declared void for fraud in actions brought to enforce them in other states.[29] Fraud and imposition invalidate all judgments, as they do all acts; and the courts have power to grant relief when they are thus obtained. This is a principle of law well settled both in England[30] and this country.[31] Where the question is one of jurisdiction, and the record shows that the defendant entered his appearance by attorney he will be permitted to show that the attorney claiming to appear for him never was employed and empowered by him to do so, just as he may show want of service or jurisdiction.[32] Judge Story adheres to the doctrine of the

[24] Mclure v. Benceni, 2 Ired. Eq. 513; s. c., 40 Am. Dec. 437; Savings Inst. v. Guber, 34 N. J. Eq. 130.

[25] 22 Am. L. Reg. (N. S.) 700.

[26] Penn v. Lord Baltimore, 1 Ves. 444; Massie v. Watts, 6 Cranch. 148; Watkins v. Holman, 16 Pet. 25; Corbett v. Shutt, 10 Wall. 464; Wood v. Parsons, 27 Mich. 159; Lewis v. Darling, 16 How. 1: Brown v. Easton, 23 Vt. 495; Salmond v. Price, 13 Ohio, 368; Price v. Johnson, 1 Ohio St. 390; McLean v. Lafayette Bank, 3 McL. 622; MacGregor v. MacGregor, 9 Iowa, 65.

[27] Thorner v. Battory, 41 Md. 593; s. c., 20 Am. Rep. 74.

[28] Dernick v. Brooks, 21 Vt. 569.

[29] Ward v. Quinlivin. 57 Mo. 426.

[30] Ochsenbein v. Papelier, L. R. 8 Ch. App. 695; Goddard v. Gray, L. R. 6 Q. B. 139, 149; Castrique v. Imrie, L. R. 4 H. L. 445; Price v. Dewhurst, 8 Sim. 279; Dimes v. Proprietors, 3 H. L. Cas. 759, 793; Waydell v. Insurance, 21 Upper Canada, Q. B. 612; Olemacher v. Brown, Id. 44, 366; Trucotte v. Dawson, 30 Upper Canada, C. P. 23; Reimers v. Druce, 23 Beav. 145; Henderson v. Henderson, 6 Q. B. 288.

[31] Rugal v. Wood, 1 Johns. Ch. 402; McDonald v. Nielson, 2 Cow. 139; Duncan v. Lyon, 3 Johns. Ch 351; Marine Ins. Co. of Alexandria v. Hodgson, 9 Cranch 206; Shottenkirk v. Wheeler. 3 Johns. Ch. 275; Dobson v. Pearce, 2 Kernan 165; Marx v. Fore, 51 Mo. 74; Rogers v. Gwinn, 21 Ia. 58; Pierce v. Olney, 20 Ct. 544; Christmas v. Russell, 5 Wall. 270; Rankin v. Goddard, 54 Me. 28; Hall v. Thayer, 105 Mass. 299.

[32] Shumway v. Stillman, 6 Wend. 453; s. c. 15 Am. Dec. 374; Aldrich v. Kinney, 4 Ct. 380; Price v. Ward. 1 Dutch, 225; Thompson v. Whitman, 18 Wall. 464; Shelton v. Tiffin, 6 How. 163; Knowles v. Gas Light Co. 19 Wall. 58; Bartlett v. Knight. 1 Mass. 401; s. c. 2

conclusiveness of foreign judgments,[33] and is followed in Cummings v. Banks.[34] The same doctrine was early declared in Ohio;[35] but in Vermont it is said that where there is an action on a foreign judgment the defendant may produce evidence to raise a presumption that the plaintiff's original claim was groundless, and that this will require the plaintiff to prove his claim *de novo*, and that the trial will be conducted as though no judgment had previously been rendered,[36] yet there is no case even in that state, in which the judgment of a foreign court of record of general jurisdiction has been held void, unless for a defect of jurisdiction [37]. In Baker v. Palmer,[38] the Supreme Court of Illinois held that a judgment in a foreign state or country by a court having jurisdiction alike of the parties and the subject matter of the action is conclusive, and that the defendant will not be allowed to go behind such judgment for the purpose of attaching the conclusions on the merits; and the fact that any defense which is set up would have been admitted in the original action is a complete and conclusive answer to it,[39] although he will be allowed to impeach it for fraud. The pendency of an appeal from a foreign judgment to a court of review in the same country is no defense to a suit to enforce such judgment.[40] In Embury v. Conner,[41] the court proceed a step farther and say that "the judgment or decree of a court of competent jurisdiction, is, as a general rule final not only as to the subject matter thereby actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have decided, can admit of no doubt;"[42] and that such a judgment is, "as between the parties and their privies conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact as once tried and found; whether it is pleaded in bar or given in evidence, when it is proper to be given in evidence."[43] The rule as laid down by Justice Story and enunciated by the courts of New York, Ohio and Illinois as seen above, obtains also in New Hampshire,[44] Rhode Island,[45] Connecticut,[46] and the other states with the possible exception of Vermont.[47] This doctrine has been frequently maintained respecting judgments and decrees of courts most palpably erroneous, but clearly within the jurisdiction of the courts which rendered them.[48]

A judgment by a court of competent jurisdiction can not be impeached colaterally for error or irregularity, but is conclusive until set aside or reversed by the same court or same superior one having appellate jurisdiction.[49] It seems that an *ex parte* judgment from a sister state is void;[50] and the authorities are uniform

Am. Dec. 38; Thompson v. Erneest, 15 Ill. 416; Lawrence v. Jarvis, 32 Id. 304; Marx v. Fore, 51 Mo. 69; s. c. 11 Am. Rep. 432; People v. Darvell, 25 Mich. 247, s. c. 12 Am. Rep. 260; Eaton v. Harty, 6 Neb. 419; s. c. 29 Am. Rep. 365; Carleton v. Bickford, 13 Gray 596; Gilman v. Gilman, 126 Mass. 26; s. c. 30 Am. Rep. 646; Bowler v. Huston, 30 Grat. 266; s. c. 32 Am. Rep. 673.

[33] Conflict of Laws, etc. 607.

[34] 6 Barb. 601.

[35] Silver Lake Bank v. Harding, 5 Ohio, 545.

[36] King v. Gilder, 1 D. Chip. 59.

[37] Hammond v. Wilder, 23 Vt. 346; Christmas v. Russell, 5 Wall, 307.

[38] 83 Ill. 561.

[39] Vanquelin v. Banard, 15 C. B. N. S. 341 C.

[40] Scott v. Pilkington, 2 B. & S. 11.

[41] 3 Coms. 522.

[42] See Voorhees v. The Bank of the U. S. 10 Pet. 449; Le Green v. Governeur, 1 Johns. Cas. 436 (2 ed). note A. J. 492; 2 Smith's Leading Cases, Title, Estopple p. 455 note; Outram v. Moorwood, 3 East 346; Etheridge v. Osborn, 12 Wend. 399; Dutchess of Knightston's Case, 11 S. & T. 261, 1 Phill's Ev. 223.

[43] Gardner v. Buckbee, 3 Cow. 120; Burt v. Stonetarger, 4 Id. 559; Wood v. Jackson, 8 Wend. 1: Young v. Black, 7 Cranch 565; Wright v. Butler, 6 Wend. 80; Eastman v. Cooper, 15 Pick. 276.

[44] Hollister v. Abbott, 11 Foster 448.

[45] 1 R. I. 77.

[46] Topp v. Branch Bank of Alabama at Mobile, 2 Swan 188.

[47] Wall v. Wall, 28 Miss. 413; See also, Mills v. Dufree, 7 Cranch 481; Hampton v. McConnel, 3 Wheat. 234; Green v. Sasmiento, 1 Pet. 74; Armstrong v. Cassen's Ex'rs 2 Dall. 302; Borden v. Fitch, 15 John 121; McRea v. Mattoon, 13 Pick. 53.

[48] Wall v. Wall, 28 Miss. 413; See also, Fisher v. Barrett, 9 Leigh 131; State v. Scott, 1 Bailey (s. c.) 294; Betts v. Bagley, 12 Pick. 572; Brittain v. Kinnaird, 1 B. & B. 432; 3 Phill's Ev. (C. & H's notes) 10 21.

[49] Smith v. Lewis, 3 John. 157; Homer v. Field, 1 Pick. 435; Dobson v. Pearce, 2 Kernan, 164; Elliot v. Piersol, 1 Pet. 304; Mills v. Duryee, 7 Cranch 484; Homes v. Kenison, 20 Johns. 268; Phillips v. Hunter, 2 H. Bl. 415; Brown v. Compton, 8 D. & E. 424; Lotham v. Edgerton, 9 Cow. 227; Hecker v. Jarratt, 4 Binn. 410; Peck v. Woodbridge, 3 Day 36; Lorinz v. Mansfield, 17 Mass. 394; Homer v. Fish, 1 Pick. 439; Garrill v. Whittier 3 N. H. 269; Smith v. Knowlton, 11 Id. 191; Kittridge v. Emerson, 15 Id. 227 Nichols v. Smith. 6 Foster 298; Demerritt v. Lyford 7 Id. 541; Lamprey v. Nudd, 9 Id. 229; Smith v Lowry, 1 Johns. Ch. 322; Holmes v. Remeen, 4 Id. 468; Landes v. Brant, 10 How. 348.

[50] Gillet v. Camp, 23 Mo. 375; Winston v. Taylor, 28 Mo. 82; Latimer v. U. P. Ry Co., 43 Mo. 105;

that a judgment in one state against a citizen of another state on constructive notice, is a nullity outside of the state in which rendered irrespective of the faith and credit that may be given it in that state,[51] because a judgment or decree rendered in a sister state without actual notice to the defendant is not a valid judgment.[52] Service by publication, where the defendant does not appear is not a valid service outside of the state where publication is made and judgment rendered.[53] To make the service good the defendant must be found within the territorial jurisdiction of the court.[54]. It has been held that service upon the president of a foreign corporation who happens to be temporarily sojourning in the state, but who does not appear and defend in the case is a nullity outside of the state.[55] Service of process beyond the jurisdiction of the court can not oblige the party to appear and defend in that court.[56] The court say in Shepard v. Wright,[57] that a citizen of one state or country can not be compelled to go into another state or country to litigate a civil action by means of a process served in his own state or country, and a judgment upon such service, where no appearance is made by the person so served, can impose no personal liability which will be recognized beyond the state in which the action originated.[58] Where a non resident possesses property or choses in action in one state and resides in another the court may proceed *in rem* by attachment and serve process on defendant through the mail or by publication in a newspaper; but although the court may thus obtain jurisdiction over the property for the purpose of the judgment,[59] it thereby acquires no jurisdiction over the person of the defendant and the judgment cannot impose on him any personal obligation, and outside of the jurisdiction where rendered it is a mere nullity.[60]

JAS. M. KERR.

Columbus, O.

51 Anderson v. Anderson, 23 Mo. 379.

52 Salle v. Hays, 3 Mo. 116.

53 Winston v. Taylor, 28 Mo. 82; Latimer v. U. P. R. Co. 43 Mo. 109.

54 Latimer v. U. P. Ry. Co. *supra*; Rose v. Himeley, 4 Cr. 241; Bischoff v. Wethered, 9 Wall. 312; Pennoyer v. Neff, 95 U. S. 714; Scott v. Noble, 72 Pa. St. 115.

55 Hurlburt v. Hope Mutual Life Ins. Co., 4 How. Pr. 275; Brewster v. Michigan Central Ry. Co. 5 Id. 183; Bates v. New Orleans, etc. Ry. Co., 13 Id. 576; Latimer v. U. P. Ry. Co, 43 Mo. 110.

56 McEwan v. Zimmer, 38 Mich. 765.

57 59 How. Pr. 514.

58 See Freeman on Judgments, Secs. 564, 567.

59 St. Clair v. Cox, 106 U. S. 353; Pope v. Terre Haute Car M'f'g Co. 87 N. Y, 137.

60 D'Arcy v. Ketchum, 11 How. 165; Pennoyer v. Neff, 95 U. S.,714; St. Clair v. Cox. 106 Id. 353; Ruggles v. Colman, Hardin 413; Thurber v. Blackbourne, 1 N. H. 242; Whittier v. Weddell, 7 Id. 157; Sim v. Frank, 25 Ill. 175; Jones v. Warner, 81 Id. 348; Kilburn v. Woodworth, 5 Johns. 41 s. c. 4 Am. Dec. 321; Robinson v. Word, 8 Johns. 86 s. c. 5 Am. Dec. 327; Bates v. Delevan, 5 Paige 299; Starbuck v. Murray, 5 Wend. 148; s. c. 21 Am. Dec. 272; Bissell v. Briggs, 9 Mass. 462; s. c. 6 Am. Dec. 83; Pelten v. Platner, 13 Ohio 209; s. c. 42 Am. Dec. 197; Arndt v. Arndt, 15 Ohio 33; Rogers v. Burns, 27 Pa. St. 525; Winston v. Taylor, 28 Mo. 82; Outhwite v. Porter, 13 Mich. 533; Rentschler v. Jamison, 6 Mo. App. 135.

WORKMEN'S RISKS ON STRANGER'S PREMISES.

Though workmen are working, and have worked every day and year for centuries, yet there are many points connected with their employment which the most astute lawyer can not easily decide, so as to say whether, in case of accident, there will be any good cause of action. It is not necessary to refer to the general relations between employers and their men, for such relations almost exclusively arise out of contract. In other words, when any question arises between workman and master, the reference must at once be made to the terms of the contract which was entered into, for by the express and implied terms of that contract the complaining party must stand or fall. But there are a great many other occasions in which workmen are placed in difficulties by the accidents of their service which do not cause any dispute between master and servant. The dispute is rather between the workman and third parties, with which the master of the workman has nothing to do. In many cases the servants of a master are hired to do work on the hirer's premises, or it may be they are called upon to use in the master's service tools or apparatus supplied by a stranger, or to do repairs on premises of strangers pursuant to some contract with the master. And in many ways servants and workmen, it is well known, are invited to do work on premises while these are not in a

safe condition. In all such cases there is or may be no contract between the workman and the owner of premises, or with the manufacturer who supplies goods to be used. In such cases, accordingly, there is no privity, as it is called, between the workman and the stranger contracting with the workmen's master. But it does not follow that there is no remedy. The puzzle undoubtedly often is to discover in what cases the liability is incurred—at what stage it comes into play—and whether it depends on a combination of many circumstances, or only on one characteristic. On this and the like subject an important case has recently been decided by the Court of Appeal, which will merit a careful perusal. It is the case of Heaven v. Pender, which promises to be a leading case, and one of great value, and considering the wealth of the losing party, can scarcely fail shortly of reaching the House of Lords. The defendant supplied and erected a staging round a ship, under a contract with the ship owner. The plaintiff was employed by the ship owner to paint the ship, and, in the course of the work, fell from the staging and was injured by reason of a defect in its condition. It was held that the defendant was liable.[1]

There seems to be a conflict of authority on the subject of the case referred to, and the great difficulty is whether the case comes within one class of authorities or another. As will be seen, the Queen's Bench Division, consisting of Field, J., and Cave, J., came to one conclusion, and the Court of Appeal of three judges have come to the contrary conclusion. One can scarcely suppose the matter will drop at this stage. And so great is the interest, and so extensive the application of the rule, if it be a rule, that the House of Lords can not be better employed than in reviewing the authorities and sifting the good from the bad so as to make a plain rule for the future.

It will be necessary only to refer to one or two of the cases which seem to be of the same class as that which has just been decided, so as to appreciate the importance of the decision. One of the most noted is that of Langridge v. Levy,[2] where the father of the plaintiff bought a gun from the defendant, for the purpose of being used by the plaintiff, and the defendant represented that it was a safe gun to use. Nevertheless, it exploded in the hands of the plaintiff, who was greatly injured thereby, and who sued the defendant for damages. The court held that though there was no contract between the plaintiff and defendant, yet there was a misrepresentation followed by damage directly resulting therefrom, and this was a good cause of action.

A somewhat similar case was that of George v. Skivington,[3] where a husband and wife sued a chemist for supplying hair-dye for the wife's use. The defendant sold a compound as to which he professed that it was known only to himself, and that it was of great virtue as a hair wash, and would do no injury to anyone. The plaintiff's wife bought a bottle, and she also used it, but it destroyed her hair and injured her health. The action was brought on the ground that the article was unskilfully made, and its alleged good qualities were misrepresentations. On demurrer, the

[1] 46 J. P. 700; 26 Alb. L. J. 347; L. R., 9 Q. B. Div. 302; 28 Alb. L. J. 143. The Court of Appeal reversed the judgment of the Queen's Bench Division.

[2] 4 M. & W., 337. In Carter v. Towne, 103 Mass. 507, it appeared that a boy bought some gunpowder, and in the absence of his parents put it in a cupboard in his father's house while his parents were away; a week afterwards his mother gave him some of the powder, and he fired it off without her knowledge; some days later he took, with her knowledge, more of the powder, fired it off and was injured by the explosion. *Held*, that the injury was not the direct or proximate, natural or probable result of the sale of the powder, and the seller was, therefore, not liable to the child for the injury. See Greenland v. Chaplin, 5 Exch. 243; Hoey v. Felton, 11 C. B. (N. S.) 142; Weatherford v. Fishback, 4 Ill. 170; Young v. Hall, 4 Geo. 95; Addington v. Allen, 375. In Vicar v. Wilcox, the special damage proved was, that in consequence of the defamation by the defendant of the plaintiff, his employer had discharged him from employment; 8 East. 1; but Lord Ellenborough said that that was a mere wrongful act of the master for which the defendant was no more answerable than if, in consequence of the words, other persons had afterward assembled and seized the plaintiff and thrown him into a horse-pond by way of punishment for his transgression. See also Ward v. Weaks, 7 Bing. 211. In Tutein v. Hurley, 98 Mass. 211, the defendant finding some hoisting shears held by two guys, cast the front guy loose so that it might not interfere with him. The next day some boys swung on the rear guy and caused the shears to fall and break: *Held*, that the defendant was not liable.

[3] L. R., 5 Ex. 1. A very nice illustration of the duties one owes to others may be seen in Thomas v. Winchester, 6 N. Y. 397. There the defendant, a druggist, negligently sold a package of poison labelled as Extract of Dandelion to another druggist, who resold it to a third, who sold it to the plaintiff, who was injured by making use of it, supposing it to be correctly labelled. The court distinguishes the case from one in which two parties deal with each other

Court of Exchequer held that the ground of action was well laid, for that a duty arose on the part of the defendant when he knew the purpose for which the hair-dye was bought, to use due care and skill in compounding it, and to make it fit for the purpose intended. The judges all agreed that these were sound grounds of action. One judge said it would be monstrous if there was no remedy in such circumstances.

One case on the other side of the question may also be noticed, that of Winterbottom v. Wright,[4] where a coachman drove the mail coach and it broke down and caused him the injury. He was advised to sue the contractor who supplied the coach to the Postmaster-General. But he was not a servant of the contractor. And the court held held that as there was no privity and no obligation to warrant the coach as between the contractor and the driver, no action was competent. This case shows the two extremes between which the cases lie, and the difficulty of deciding which view is to prevail.

Another class of cases come under the description of cases where people are invited to come on premises and then some danger overtakes them there, causing injury. A leading case of this kind was that of Indermaur v. Dames,[5] where a considered judgment was given by Willes, J., and is of great value. The defendant ordered a gas regulator to be fixed in his sugar refinery, and the plaintiff was the workman sent by the patentee who supplied the regulator to fix it up. It so happened that there were dangerous places in the factory, and a German who could not speak English was sent to show the place, carrying a lamp. In accompanying the guide the plaintiff fell down a shaft, a depth of some thirty feet, and for this damage he sued the defendant, alleging that the defendant negligently and wrongfully allowed dangerous places to be unfenced and the plaintiff to go without proper warning. The court held that the action was well founded. And Willes, J., pointed out the distinction. between a visitor to premises and a customer. The protection did not depend on the fact of a contract being entered into in the way of of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper with a view to business that concerns him. And if a customer were, after buying goods, to go back to the shop in order to complain of the quality or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit as during the principal visit which was for such benefit. And if, instead of going himself, he were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go not as mere volunteers or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And with respect to such a visitor, it is settled law that the occupier shall use reasonable care to prevent damage from unusual danger which he knows or ought to know, and this where there is evidence of neglect.

This was a case therefore of negligent keeping of premises. But the case still remains as to what is the law if a tool is supplied which may be dangerous in the using. On this last point the case of Smith v. London Docks Company,[6] is useful. The defendants provided a gangway from the shore to the ships lying in their dock, the gangway being made of materials belonging to the defendants and managed by their own servants. The plaintiff went on board a ship in the dock

under no obligations, but such as their contract imposes, and charged with no duty to third persons, and held that where one puts up a drug for a dealer, to be used by such person, who may ultimately purchase it, he is responsible to the latter for the injury flowing from his negligence. See Lynch v. Nurdin, 1 Q. B. 29; Illidge v. Goodwin, 5 C. & P. 190; Wheeler v. Downer, etc. Co., 104 Mass. 64.

[4] 10 M. & W., 109. In Loop v. Bennett, 42 N. Y. 351, a conclusion was reached which may well be considered in connection with this case. It was there held that the vendor of an article of his own manufacture is not liable to one who uses the same with the consent of the purchaser, for injuries resulting from a defect therein, unless such article is imminently dangerous. See Lynch v. Nurdin, 1 Q. B. 29; Illidge v. Goodwin, 5 C. & P. 190. See McDonald v. Snelling, 14 Allen, 290.

[5] L. R., 2 C. P., 311.

[6] L. R., 3 C. P., 326.

at the invitation of one of the ship's officers, and while he was on board, the defendants' servants, for the purpose of the business of the dock, moved the gangway so as to make it insecure. The plaintiff, in ignorance of this insecurity, returned one night and fell into the water and was injured. The Court of Common Pleas held that as the plaintiff was there on the business of the ship in the defendant's dock, the only access to which was supplied by them, he was there on business in which they were interested, and therefore that they were liable for injuries he sustained through the negligence of their servants. And moreover that the plaintiff was not a mere volunteer, but he passed along the stage by the tacit invitation of the defendants, and that as the dangerous state of the stage was in the nature of a trap, and was known to the defendants, and not communicated by them to the plaintiff they were liable for the injuries he sustained.

These cases bring the points pretty close which bear on the facts of Heaven v. Pender. The action in this last case was brought by a workman, who was a ship painter, and was sent by his master to paint a ship then lying in the defendants' dock. The ship owner had contracted with one Gray, for the painting of the ship while it lay in the dock, and the plaintiff was one of Gray's men. The defendants had agreed with the shipowner to supply and erect a staging round the ship for the purpose. Owing to a defect in one of the ropes supplied by the defendants to support the staging, it gave way, and the plaintiff was thrown down and severely injured. The rope when examined had the appearance of having been burned at the place where it broke. There was, however, no evidence as to the condition in which the rope was put up, nor that the defendants or their servants knew anything of its defects. The defendants had no control over the plaintiff during the work. An action being brought against the dockowners they relied on the fact that there was no privity of contract between the plaintiff or his employer and the defendants, and there was no ground of action. The Queen's Bench Division held this case was like that of Winterbottom v. Wright, and that owing to the want of privity the plaintiff could not succeed. But the Court of Appeal have overruled the Queen's Bench Division, and while one judge attempted to lay down a general rule embracing all the cases, the majority, consisting of the other two judges, put the case on the footing of the defendants inviting all shipowners to come and use the dock and all the appliances of the dock. Therefore they put their judgment on the doctrine of invitation, but stretched the former rule so as to embrace all the tackle and apparatus used on the premises as if they formed part of the premises. This seems to go a great length. But it is nothing to the length which the Master of the Rolls proposed to go. He laid down a rule which he thought embraced all the cases that had yet occured, and that rule was this, whenever one person supplies goods or machinery or the like for the purpose of their being used by another person under such circumstances that every one of ordinary sense would if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such things. And for a neglect of such ordinary care or skill whereby injury happens, a legal liability arises to be enforced by an action for negligence.

This rule might be expressed more tersely, but it seems very alarming to shopkeepers, and manufacturers and housekeepers as it seems to involve a universal warranty. There seems no limit to the liability that may arise. The shopkeeper who sells a paraffine lamp, or the lady who lends a picture hanger her household steps to fix a nail, will apparently be liable for some mishap in the use of the chattel. The rule may be just enough as to buildings and premises and the traps and secret holes therein, for no vigilance of strangers can guard against these. But as to chattels used on the premises each person allowed the use of them can judge of their safety quite as well as the owner, and it is hard to see where the liability of the owner or maker of chattels will now end. This is of all recent cases one which requires elucidation and further consideration in the House of Lords. —*Justice of the Peace.*

COMMON CARRIER — ESTOPPEL — BAGGAGE — TERMINATION OF LIABILITY — AUTHORITY OF AGENT.

TEXAS, ETC. R. CO. v. CAPPS.

Supreme Court of Texas.

1. Although samples carried by a passenger are not personal baggage, yet, if the baggage master, knowing the character of the articles carried, accepts them as baggage, the carrier is estopped to deny that they were baggage in an action for their loss.

2. Although the liability of a common carrier is terminated after a reasonable time after the arrival of baggage at its place of destination, and although, if the station master at such place consents to hold such baggage for the owner, after such time, the carrier's liability continues, yet, if the station master be ignorant of the fact that it is not personal baggage, the company is not responsible, notwithstanding the former estoppel.

3. The burden of proof is upon the bailor of goods to show neglect on the part of a warehouseman in an action for the value of goods destroyed by fire.

WILLSON, J., delivered the opinion of the court:

Appellee instituted this suit in justice's court to recover of appellant $104.50, the alleged value of a trunk and its contents, shipped by him as baggage over appellant's road from Big Sandy to Longview, and destroyed in a fire which burned up appellant's depot at the latter place.

Appellee recovered judgment for the full amount of his claim, and for costs, in justice's court. On appeal by appellant to the county court, and upon a trial *de novo*, appellee's judgment was reduced to $98 and all costs incurred in the justice's court, etc., and from this judgment appellant has appealed to this court.

1. It appears from the evidence that appellee's trunk contained one sample liquid cooler, nickel-plated; one ventilated beer faucet, one wrench and one lemon squeezer, which were samples being carried for the purpose of effecting sales.

It is contended by appellant, and correctly, that these articles did not constitute baggage. By baggage is understood such articles of personal convenience, or necessity, as are usually carried by passengers for their personal use, and not merchandise or other valuables, although carried in the same trunk of a passenger, but which are not, however, designed for any such use, but for other purposes, such as sale and the like. W. & W.'s Con. Rep., Sec. 614, 1254, 1255; Hutchinson on Carriers, sec. 679, 685; Thompson on Carriers of Pass., 510.

2. But appellee replies to this that the trunk and its contents were received by the company as baggage, the agent of the company who received it as such having knowledge at the time of the contents of the trunk, and that therefore the company is estopped by the act of its agent from now denying that the same was baggage. It was proved that at the time of taking passage upon the company's train with his trunk, the appellee notified the ticket agent of the appellant, from whom he purchased his ticket, that his trunk contained the sample liquid cooler, but it is not shown that this notice extended to other articles in the trunk. With this knowledge that the trunk contained the liquid cooler the ticket agent checked it to Longview.

We believe it to be a reasonable and correct doctrine that where a railroad company, through its ticket or baggage agent, receives articles for transportation of baggage, knowing at the time that such articles are not properly baggage, the company will be responsible therefor as a common carrier, and will be estopped from denying that the same was baggage, at least to the extent that its agent had notice of the character of the articles. Butler v. Hudson River Railway, 3 E. D. Smith, 571: Redfield on Carriers, sec. 78 and notes; 2 Redfield on Railways, p. 46 and notes; Hutchinson on Carriers, sec. 685.

3. But the evidence further shows that the trunk and its contents were safely transported by the company to Longview, the place to which the same had been checked, and were in the depot at that place subject to the order of appellee; that appellee, soon after the arrival of the trunk at Longview, called at the depot with his baggage check and informed the agent in charge that he contemplated travelling on the company's road again in a day or so, and the agent told him he could leave his trunk in the depot until he got ready to go on the train, and retain his baggage check until then. It is not proved, nor is it pretended, that the agent of the company at Longview had any knowledge of the contents of the trunk at the time he gave permission for it to remain in the depot, or at any other time. It is contended by appellee that as the agent at Longview allowed the trunk to remain in the depot upon the prospect of appellee's again becoming a passenger upon appellant's road, this would render the company liable for the trunk and its contents as baggage. As a general rule we believe this proposition to be correct. Red. on Railways, 39 and 40; Red. on Carriers, sec. 73.

But would this character of liability attach to the company when the articles left were not baggage, and when the company, through its agents at the place where so left, has no notice that the articles were not baggage?

In this case the agent of the company at Longview received the trunk as baggage, and without notice of its contents he allowed it to remain in the depot, and while there it was destroyed by a fire which also destroyed the depot. If he had received notice of the contents of the trunk, that the same were not properly baggage, and with this knowledge had permitted it to remain in the depot with the prospect of appellee's taking passage on the road, we think the company would clearly be liable as a common carrier for its loss. But in the

absence of such knowledge of the contents of the trunk on the part of the agent at Longview, we are of opinion that the liability of the company is that of a warehouseman, and not that of a common carrier. It is clear from the evidence that the trunk had reached its destination under the contract of carriage. That contract had been fully performed on the part of the company, and no further liability as a common carrier attached to the company in regard to the trunk. Any further liability as a common carrier could, therefore, be created only by a new contract, and in making any such contract the agent at Longview nor the company would be chargeable with the knowledge possessed by the agent at Big Sandy of the contents of the trunk.

4. With reference to the delivery of the goods to the consignee, this must be construed to mean that if the consignee, within a reasonable time, does not demand the goods, the carrier's liability of such will cease. In the case of baggage the rule seems to be that the responsibility as carrier continues until the owner has had reasonable time and opportunity to come and take it away. After that the responsibility as carrier ceases and the carrier becomes a mere warhouseman, and liable as such only. "It is the duty of a railway company in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery, until the owner, in the exercise of due diligence, can call for and receive it, and it is the owner's duty to call for and remove it within a reasonable time. If he does not so call for and receive it, it is the company's duty to put it into its baggage-room and keep it for him, being liable only as warehouse-man. And the reasonable time within which the owner must call for it, is directly upon its arrival, making reasonable allowance for delay caused by the crowded state of the depot at that time, and the lateness of the hour makes no difference if the baggage be put upon the platform." Quimit v. Henshaw, 35 Vt. 605; Hutchinson on Carriers, 707, 712; Edwards on Bailments, sec. 227; Story on Bailments, sec. 213; Redfield on Carriers, sec. 73.

5. We are of the opinion that the evidence in this case limits the liability of appellant for the loss of appellee's trunk and its contents to that of a warehouseman, and such being the case, and it being shown by appellant that the property was destroyed by fire, the burden of proof devolved upon appellee to show that the loss was occasioned by negligence on the part of appellant, its servants, employes or agents. W. & W.'s Con. Rep., secs. 118, 412, 414; 2 Texas Law Review, 172.

There being no such proof in the record, the judgment must be reversed, and the cause remanded.

NOTE.—A carrier of passengers is bound by the contract to carry a reasonable amount of personal baggage at the same time with the passenger, and to deliver it to him at the end of the route, although not mentioned and, if it is lost, even without his fault, the carrier will be responsible. Hawkins v. Hoffman, 6 Hill's Rep. 586. But personal baggage includes only those articles which are reasonably necessary for his personal comfort. Ib. He is not liable for mere merchandise which the passenger passes off as baggage. Great Northern R. Co. v. Shepherd, xch. 30; s. c. 9 Eng. L. & Eq. 477; Collins v. B. & M. R. Co., 10 Cush. 506; Connolly v. Warren, 106 Mass. 146; Macrow v. Great Western R. Co., L. R. 6 Q. B. 612; nor for samples carried by a travelling salesman, as assumed in the principal case. Stimpson v. Conn. River R. Co., 98 Mass. 83; Hawkins v. Hoffman, 6 Hill, 286; Alling v. Boston, etc. R. Co., 126 Mass. 121; s. c. 7 Rep. 622; 19 Alb. L. J. 202; nor is money beyond what is necessary for travelling purposes; Grant v. Newton, E. D. Smith, 95; Whitmore v. Str. Caroline, 20 Mo. 513; Bomar v. Maxwell, 9 Humph. 621; Doyle v. Kiser, 6 Ind. 242; Jordan v. Fall River R. Co., 5 Cush. 69; the amount necessary being determinable by the jury; Merrill v. Grinnell, 30 N. Y. 594; Duffy v. Thompson, 4 E. D. Smith, 178; nor valuable papers carried by a lawyer for use in a trial at his place of destination; Phelps v. London, etc. R. Co., 19 C. B. (N. S.) 321; nor a dog. See Cantbury v. Hannibal, etc. R. Co., 54 Mo. 385. For various articles which have been held to be personal baggage, consult Thompson's Carriers of Passengers, 513.

If the baggage master accepts goods or articles under the belief that they are personal baggage, the carrier will clearly be exempt from responsibility for its loss. Cahill v. London, etc. R. Co., 10 C. B., N. S. 154; s. c. 7 Jur. N. S. 1164. It has been seriously questioned whether an undertaking by a baggage master to transport goods of a passenger known not to be personal baggage, will bind the company as a carrier, and an opinion has been expressed that it is a gratuitous undertaking, creating only the responsibility of a gratuitous bailee. Smith v. B. & M. R. Co, 3 Am. Law Reg., N. S. 126; s. c. 44 N. H. 325. But this doubt has been removed in England and Ireland where the broad doctrine seems to obtain, that the baggage master can stamp the character of personal baggage upon any class of goods, either by express undertaking or by the acceptance of goods known not to possess the inherent character of personal baggage; and this knowledge will be presumed, if the goods bear marks identifying their nature, as if they be marked "glass." Cahill v. London, etc. R Co., 13 C. B., N. S. 818; s. c. 8 Jur. 1063. See also Keyes v. Belfast, etc. R. Co., 8 Ir. C. L. 167; s. c. 11 Id. 145. But this case was afterwards reversed in the House of Lords, 8 Jur. N. S. 367; s. c. 9 H. L. Cas. 556.

In the last case, the Lord Chancellor said that the plaintiff knew well that the servants of the company were not authorized to accept goods without payment of extra freight, and that he could not found himself upon any liability of the company contracted by an agent of the company in direct contravention of its rules. But, see G. N. R. Co. v. Shepherd, 8 Exch. 30; 21 L. J. Excheq. 286; Waldron v. C. & N. W. R. Co., 1 Dak. 351; Hannibal R. Co. v. Swift, 12 Wall. 274, and in Ross v. Missouri K. & T. R. Co., 4 Mo. App. 583, the doctrine laid down in the principal case is approved. See also, Butler v. Hudson River R. Co., 4 E. D. Smith, (N. Y. C. P.) 571. But in Blumantle v. Fitchburg R. Co., where the baggage master knew that the baggage offered was merchandise, and accepted it, the company was held not responsible for the loss of the goods, in the absence of authority given to the baggage master to accept such goods. Nor, it is by the court contended, does the mere fact that there is a custom of passengers to take with them, or for the railway corporations to carry similar goods

create such authority. This case seems to be "on all fours" with the principal case. 127 Mass. 322.

(2) The second point seemed to be strained. If the goods were accepted as personal baggage, in other words, if the company was estopped to deny that they were not personal baggage, it would certainly seem reasonable to presume that they could not afterwards deny their character, in an action for the loss of the goods, within a reasonable time after they arrive at their destination. The two positions taken by the court seem to us strikingly inconsistent.

CONSTITUTIONAL LAW—EMINENT DOMAIN—LEGISLATION PRESCRIBING NO PROVISION FOR COMPENSATION.

MOODY v. JACKSONVILLE ETC. R. CO.

Supreme Court of Florida, January Term, 1884.

1. The State has the right to make a compulsory purchase of, or to condemn the property of the citizen for a public use or purpose, just compensation being made to the citizen for it.

2. Such right the State through the legislative department of the government may grant to an incorporated railway company having the usual franchises and duties attaching to such companies, to the extent that the property is necessary for the use of the corporation in accomplishing the purposes of its creation. The statute, however, must provide just compensation to the citizen for his property so authorized to be taken.

3. Neither an award of damages, nor a judgment against a corporation for damages ascertained, or to be ascertained by commissioners, is a just compensation to the citizen for the appropriation of his property by the corporation to its use in the construction of its road.

4. The designation of the corporation in whom such right to condemn for public use is to be vested, the method of condemnation and the fixing the nature and extent of the compensation to be made for the property are powers vested exclusively in the legislative department of the government.

5. In this case an entry for the purpose of continuing an unlawful appropriation or taking was enjoined. Subsequently the injunction was dissolved upon the corporation obtaining a bond approved by the judge under which the value of the property to be taken was secured to be paid after appraisement to the land owner. *Held*, in the absence of legislation giving such right to the corporation, that the court had no power to authorize a compulsory purchase by it or to prescribe a method of condemnation, or fix a compensation, just or unjust; that these were legislative "functions," which no part of the judicial department of the government could exercise unless the power so to do was "expressly provided for by the Constitution."

WESTCOTT, J., delivered the opinion of the court:

The Jacksonville, Tampa & Key West Railroad Company, through Ambler and others, its agents and contractors, without the consent of the plaintiff, Mrs. Moody, and without previous condemnation of her land, had not only located their railroad over her land, but had entered upon it and were in the act of appropriating it to the construction of its road by felling trees, digging excavations and throwing up embankments. The court, upon the bill of plaintiffs setting up these facts, plaintiffs alleging also that they did not believe said corporation would have property that could be reached by a judgment at law for damages, enjoin the defendants from entering upon the land, and the corporation and its agents from felling trees, cutting excavations, throwing up embankments, or from proceeding with the building of the road on said land until the further order of the court. The corporation and its agents answering, admit that after location of its line through the land described, they have entered thereon with their laborers, that they have made some excavations and thrown up some embankments in the course of the construction of the said railroad, as the said road crosses the said lands within the limits of the statutory width allowed, and affirm a right to do so under the laws of Florida and their charter. They admit that they have not paid for the said land, or agreed to pay any specific sum therefor, and affirm that they have exhausted every effort to do so without success. They answer further, that anterior to the filing of the bill proceedings to acquire title to so much of said land as is occupied by said railroad had been instituted, and that commissioners had been appointed under the statute to "appraise the compensation to be made to complainant, and that complainant, P. Moody, had actual knowledge and notice of these proceedings." They say further that since the filing of the bill plaintiffs have been served with notice by the commissoners of the place at which they would meet to consider the amount of compensation to which plaintiffs are entitled, and allege that the company is the owner of a franchise of great value, of about twelve miles of graded track in Duval county, and some iron, quantity not stated, soon to arrive to iron the same. They say further, that before the bill was filed they offered the complainants a good and sufficient bond as security to them for the payment of the compensation which may be awarded for the lands appropriated, to be determined by the commission. Defendants claim the right "to proceed with the construction of their road either before or after the commencement of, or pending such proceedings in the circuit court for assessing the compensation to complainant," but offer to give security for the payment of such compensation as may be awarded in the event such shall be held to be necessary, and also to comply with such equitable requirements as the court may direct, and close their answer by stating that there is no case made by the bill, and by claiming the same benefit of this fact as if they had demurred to the bill. There is an affidavit accompanying the answer which gives particulars of repeated attempts to adjust

the matter with plaintiffs. It more than sustains the answer.

Upon motion of defendants the court directed, "that the said injunction be dissolved upon the execution of a good and sufficient bond to be approved by this court, payable to the said complainants, in the sum of three thousand dollars, upon the condition that the said Jacksonville, Tampa & Key West Railroad will pay unto the said complainants the compensation to which they may be entitled for the *taking and appropriating*" (italics by this court) "by the said railroad company, of any of the lands of the complainants in their said bill, mentioned by the award of the commissioners appointed or to be appointed to consider, ascertain and fix the same under the provisions of the act of the Legislature of the State of Florida entitled (an) act to provide a general law for the incorporation of railroads and canals," approved February 19, 1874. A bond approved by the Judge and executed by parties other than the corporation, purporting to be in accordance with this order, was filed and both parties treating the injunction as dissolved the plaintiffs appealed to this court. This case must be considered first with reference to the order granting the injunction, and second in reference to the order allowing its dissolution upon the giving of the bond required. An examination of this case as we have stated it shows that the claim here made by this corporation and the claim adjudicated by the court was not a right of entry for the purpose of survey or location of the line of contemplated road, and that while the injunctional order first granted and subsequently dissolved was against any further entry, the further entry contemplated was one for the purpose of construction of the road and its permanent use by the company, such as is contemplated by the 4th subdivision of the act of the Legislature controlling the subject. This case therefore does not involve a decision of the question whether such corporation has the right of entry upon and passage over the land of plaintiff for preliminary surveys and location of the line of its road, such as is authorized by subdivision first of section ten of the statute referred to. Between the entry for construction and use and the entry for location and survey the statute itself makes a distinction. For the first it contemplates compensation. For the latter none is provided except such as is embraced in the final appraisement for the taking.

The first general question here involved is whether this corporation has the power to make a compulsory purchase of the land of the citizen for the purpose of carrying out the objects of its charter.

Under the power of eminent domain the sovereign may make a compulsory purchase of the property of the citizen when such property is to be appropriated to a public purpose or use, but such compulsory purchase, or taking as it is called, can not be made even by the sovereign "without just compensation." Such is the provision of our Constitution, which is a limitation upon all departments of the government. This, we understand, is not here denied; but if it were we should spend no time in hunting cases or precedents to sustain a principle so universally admitted. Again, that which seeks to exercise this power here is a railroad company, invested with the usual franchises to be a corporation to have the rights and duties of a common or public carrier with authority to construct a line of railway for the benefit of the public in affording additional facilities of passenger travel and freight traffic. That this is a public purpose and use for which the land of the citizen may, to the extent it is necessary to accomplish such public purpose be condemned, is also a legal proposition so well established in this country that it is certainly unnecessary to do more than state that such is the law. This leads us to the discussion of the true question in this case; and that question, in the language of the corporation here is whether the act of the Legislature under which such claim is here made assures to the owner of the private property proposed to be taken the just compensation contemplated by the Constitution, as it is admitted that this corporation can be made the subject of the grant of a power to thus take the land, and that the proper department of the government to confer the power is the legislative department thereof.

Sections 14, 15, 16, 17 and 18, of Chapter 1987, Laws, grant to the corporation the power to acquire titles to land required for its "purposes," as well as the manner of its exercise in a case of the character now before the court. The company is required to file a petition praying for the appointment of commissioners of appraisal by the Circuit Court, describing the land sought to be acquired, and after prescribing various proceedings, among which is notice and right to hearing by the parties interested, the act provides (Sec. 17) that "the report of the commissioners shall be recorded by the Clerk of the Court, in whose office the same is filed in the judgment book of said court, and at any time after filing the same the railroad or canal company may pay to such owner or owners of the lands so taken, or to the Clerk of said court, for the use of said owner or owners, the amount awarded by said commissioners, and if necessary a writ of assistance shall be issued by the said Circuit Court to put such company in possession." This is the compensatory clause for the taking authorized. The act authorizes the company "to proceed with the construction and operation of the road, either before the commencement of or pending such proceedings in the Circuit Court, to obtain titles to the land along the line or route of its road, and there is no provision in the act authorizing the landowner to institute the proceeding. Other provisions of the act regulating proceedings to acquire titles, under circumstances not existing in this case, and which do not apply to it, are called to our attention by the appellee, but as they d not

control this proceeding or upon their face, or according to their plain letter and intent purport in any manner to affect the present case it is only necessary to mention their character. These sections prescribe a method of proceeding, where the company shall not have acquired title to land upon which "they have constructed their track," or if after attempt to acquire title, the title "attempted to be acquired is defective," or the title is in a trustee of an infant or idiot without power of sale.

From this recital of the provisions of the act it is seen that so far as the matter of making compensation to the owner is concerned, the statute requires nothing more than that "the report of the commissioners shall be recorded by the Clerk of the Court in whose office the same is filed in the judgment book of said court." It is said that this amounts to a judgment of the court. We do not think that this is so. We think, looking to this statute as an entirety, that the Legislature, in directing the recording of this award in the judgment book, did not intend to make it a judgment any more than a direction to record it in the deed or execution book would have manifested an intention to make it a deed or execution. Not only is this so, but the provision that the corporation may at any time after filing the award pay the sum awarded to the owner, seems to contemplate no process by which any judgment before the taking is consummated by absolute appropriation can be enforced at the instance of the land owner, and we think it clear from the terms of this section (17) and the provision in section 14, which provides that the corporation may proceed with the "construction and operation of its road," that is to a complete taking, even before the filing of the petition to ascertain the damage, that the Legislature contemplated here nothing except what it in words expressed; and acting upon the idea that the corporation would pay after the filing of the report fixing its amount, it did nothing more than "fix any time" after such filing as the date upon which it might do so. Where is the authority in this statute or elsewhere for the clerk, after recording the report in the judgment book, all that the law directs, to follow such record with a *consideratum est per curiam* against the corporation as to the damages awarded? It is true as contended by the corporation here that the 14th section of the act provides that from the time of filing the petition the proceedings shall be considered a suit pending in the Circuit Court of such county, and to the extent that such proceedings as prescribed can be given effect as judicial proceedings, we will do so. Such is our duty. But surely, if we go beyond this; if we add to the plain terms of the law and authorize other and additional proceedings, and those, too, of the most important character, do we not become to that extent legislators, and in effect add to and amend this statute? Judicial legislation, to the extent that it exists anywhere when clearly shown is little less than a crime, and there is no more important organic limitation viewed in any respect than that which in unmistakable terms says, to judicial tribunals, you shall not exercise the functions of the legislative department of the government. The simple filing of a report of the commissioners, whether it be in one book or another, does not in any sense amount to more than ascertaining the amount of compensation or fixing the amount of the claim or debt. A taking of private property upon such simple finding of the amount of compensation due is clearly a "taking of private property without just compensation."

In view of the fact that our conclusion is the same, viewing this case in such aspect, and in view of the additional fact that this case has been argued in that light, we will, however, treat this filing of a report as equivalent to a judgment for the land owner.

The question then is, a judgment against a corporation, with the right to have execution thereof, a just compensation to the land-owner for the taking of his land for construction of the road of the corporation and its appropriation to its use?

Chancellor Kent's view seems to be that the indemnity should, in cases which would admit of it, be previously and equitably ascertained, and be ready for reception concurrently in point of time with the actual exercise of the right of eminent domain. 2 Kent's Commentaries, 339, note. Mr. Justice Cooley, in his work on Constitutional Limitations (5th ed., p. 697), says: "On general principles it is essential that an adequate fund be provided from which the owner of the property can certainly obtain compensation. It is not competent to deprive him of his property and turn him over to an action at law against a corporation which may, or may not, prove responsible and to a judgment of uncertain efficacy. For the consequence would be in some cases that the party might lose his estate without redress in violation of the inflexible maxim upon which the right is based."

In the case of Thompson v. Grand Gulf, etc. Co. (3 How. Miss. 249), one of the questions involved was whether a judgment was compensation within the meaning of the Constitution of that State. Chief Justice Sharky there says, "the judgment in this case is not compensation. A judgment is but a security for compensation, or satisfaction, which may or may not prove productive. In principle there is no difference between a judgment and a bond except that one is a security of a higher nature than the other. Suppose the legislature had said that the railroad company should give bond for the payment of the damages assessed, could it be said to be a compensation? And yet it might be quite available as a judgment." It is true that the Constitution of Mississippi, in force at the time this opinion was rendered, differed with ours in that it required that compensation should be "first" made, but it is plain that this difference does not render inapplicable here this definition of compensation, as it is given without reference to the time at

which it was to be made. What is said is that "the judgment is not compensation."

Could language more completely cover a case than this language of these two eminent jurists does the present controversy. If the statute is construed to establish a claim or debt and leave the party to his action, this clearly is insufficient, and if it gives a judgment the party might lose his estate without redress. It must be borne in mind, too, that the statute with this construction, does not leave the question of solvency or insolvency of the corporation open for inquiry. It permits nothing of the kind. Under this construction any corporation, whether it be solvent or insolvent, whether all of its franchises and all of its property, owned at the time of taking the property of the citizen, and to be thereafter acquired, including the identical property taken, is or is not subject to a first mortgage equal to its full value, the citizen must accept the judgment against it as the just compensation of which the Constitution says no power in the government shall deprive him. We have no doubt at all that that portion of the statute which authorizes the taking of private property, and which we have been considering is unconstitutional and void. Under these circumstances our duty is to enforce the Constitution, the common superior of legislatures and judicial tribunals, and disregard the statute to the extent indicated. As to any other part of it we say nothing.

We leave this branch of this case with an allusion to a case to which our attention is especially called by the corporation here. The case is Bloodgood v. Mohawk, etc. Co., 18 Wend. 17. Chancellor Walworth in this case, in his comments upon the exercise of the power of eminent domain by the State or its agents, addresses his remarks in one place to the exercise of the right of eminent domain by the State or its agents for the purpose of making public highways or for the use of the State canals. He there says that "the compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided, and upon an adequate fund whereby he may obtain such compensation through the medium of the courts of justice if those whose duty it is to make such compensation refuse to do so." He then gives as an illustration of his views the remedy in a case where the town, county or State officers refuse to do their duty "in ascertaining, raising or paying such compensation in the mode prescribed by law," which he says is "by *mandamus* to compel them to perform their duty," holding that "the public purse or the property of the town or county upon which the assessment is to be made may justly be considered an adequate fund." When, however, he comes to consider the case before him, which was trespass *quare clausum fregit*, the alleged trespass being a breaking down of plaintiff's fences, destroying his trees and digging up his soil (which is the injury in this case), his response to a plea, justifying under defendants' act of incorporation without averring that the damages had been regularly assessed and paid, or deposited in bank to the credit of the owner, before entry and appropriation as required by the charter, his language fully sustains the conclusion we have here reached. He says "the citizen whose property is thus taken from him without his consent is not bound to trust to the solvency of an individual or even of an incorporated company, for corporations as well as individuals are sometimes unable to pay all their just debts, especially those corporations which are authorized to incur heavy responsibilities" (and the defendant here is one of that kind), "in anticipation of the payment of their capital by the subscribers for the stock, and if the true construction of this charter was such as is contended for by defendants' counsel" (which was that it authorized the acts complained of before payment for the land), "I should hold that the provision which authorized the appropriation of the plaintiff's property to the use of the corporation before the damages had been ascertained and paid was unconstitutional and void." This is what we have been constrained to do here. While the construction of this road is a matter of great importance to a large number of our people, our plain duty requires us to say, as Chancellor Walworth says he would have been constrained to say of a similar act, that the provision authorizing an appropriation of plaintiffs' property here is unconstitutional and void.

We think, therefore, that the granting of the injunction was proper. The only other questions existing in this case, as it was submitted, arise out of the order of the chancellor dissolving the injunction upon the coming in of the answer of defendants. From the statement of the case it is seen that the court dissolved the injunction thus granted upon the execution of a bond approved by the court, the condition of the bond being that the corporation would pay to complainants the compensation to which they may be entitled for the taking and appropriating by the said railroad company of any of the lands of complainants to be thereafter ascertained under the statute. The result of this action is that a re-entry against the will of the owner and for the purpose of appropriation is authorized upon the giving of a bond of the character named. Could the plaintiffs recover in an action upon this bond? As a statutory obligation it is void. Could it be regarded as an obligation at common law? See Vilhac v. S. & I. Railroad Co., 53 Cal., 212. The court thus in the absence of any act of the Legislature authorizing this company to exercise the right of eminent domain, in other words to take the property of plaintiff against his will, authorizes it to do so, and that too without just compensation, for as we have seen neither a bond nor a judgment of this kind answers this requirement of the Constitution in this particular. The rule that a court of equity having acquired jurisdiction for one purpose may exercise it to the doing

of full equity between the parties has no application here. This matter is controlled by principles much more elementary and important that those which concern the mere rules of remedial practice in equity. The right of compulsory purchase under the Constitution does not attach to all corporations organized for a public purpose any more than it does to individuals who propose to accomplish a like public purpose, and a court of equity independent of legislative grant to such corporation or individual can no more designate or authorize the corporation to exercise such power than it can an individual having no corporate power of any character. It can no more grant here this right of compulsory purchase than it can the franchise to be a corporation. The designation of the corporation or individual to exercise the power, the granting of the right of compulsory purchase, and the requirement to make and the method of making just compensation, are all legislative "functions" and in the absence of legislative action authorizing these acts the courts are powerless, either through the instrumentality of injunctions granted or dissolved or otherwise, to authorize the exercise of such powers. In proper cases the courts may and must construe the Constitution, and determine where the right of the land owner is involved, whether such power has been conferred by the legislature upon a corporation in a constitutional method, and to see that it is properly executed if such method is prescribed. With that our power ceases, for if it is not thus given to the corporation we cannot give it any more than the legislature can enter a judgment in proceedings other than those embraced within its specially granted judicial powers, such as impeachment and trial of an officer of the government under certain circumstances. This (the granting of the right of compulsory purchase) is clearly a purely legislative function, and the Constitution, article III, provides that, "no person properly belonging to one of the departments" of government "shall exercise any functions appertaining to either of the others except in those cases expressly provided for by the Constitution." In the absence of legislation granting the power the right of the land owner is precisely such as exists without any legislation on the subject, constitutional or otherwise, except perhaps in some matters of tort, and he may seek his remedy at law or in equity, as the nature and extent of his injuries require, and the remedial law and practice of the courts of common law and equity justify and authorize. Surely a court of equity cannot say to the land owner "you shall submit to a trespass; you shall part with your land whether you desire to do so or not, at a price which commissioners may value it at," and that too in a case instituted by the land owner praying protection from this very act of illegal appropriation. The last order in this case, bearing date the second day of June, A. D., 1883, and all orders herein made are set aside, except the injunction granted upon the filing of the bill, and that will be revised to continue until the further order of the court, or until the corporation may be granted the right of compulsory purchase of the land of the plaintiff by the proper authority, and just compensation is made to him therefor upon its legal condemnation to the use of the company.

The case is remanded for such proceedings as are consistent with the opinion herein rendered, and the principles of equity.

WEEKLY DIGEST OF RECENT CASES.

1. ADMINISTRATION—AUTHORITY OF ADMINISTRATOR.

An administrator has authority to make a contract with a firm of attorneys, employing them to prosecute a suit against a life insurance company for a stipulated portion of the proceeds, and to empower them to compromise it as they see fit, and the death of the administrator did not terminate such authority; and a compromise by one of the firm was binding. *Jeffries v. Mut. L. Ins. Co.*, U S. S. C., Feb. 4, 1884; 4 S. C. Rep. 8.

2. ADMINISTRATION—POWERS OF ADMINISTRATORS DE BONIS NON.

A deposited money with a bank as administrator of B's estate. A died and the administrator *de bonis non* of B's estate, drew the balance of the account out of the bank. *Held*, on a suit by the administrators of A against the bank, that the bank should not have paid the money to the administrator *de bonis non*. *Slaymaker v. Farmer's Nat. Bank.* S. C. Pa.; 41 Leg. Int. 85.

3. ASSIGNMENT—COLLATERAL SECURITY TO CREDITORS.

An assignment of a claim to a part of the assignor's creditors "as collateral security," is ineffectual as against a subsequent general assignment to creditors. *Geists Appeal*, S. C. Pa. Jan. 7, 1884, 14 Pitts. L. J. 299. *McCormick v. Atkinson*, S. C. App. Va. 8 Va. L. J. 145.

4. ATTORNEY AT LAW—MALCONDUCT IN OFFICE.

For an attorney to stop a judge of a Court on the street, and use abusive language to him concerning any judicial action in a case pending before such judge, is such malconduct in office as will warrant the striking of his name from the roll of

attorneys. *People v. Green*, S. C. Colo. Feb. 29. 1884, 4 Colo. L. Rep. 473.

5. BANKING—LIABILITY FOR NEGLIGENCE OF NOTARY.
A notary public employed by a bank to protest business paper is the sub-agent of the owner, and the bank is not liable to him for the notary's neglect to fix the indorser's liability. *First Nat. Bank v. Butler*, S. C. Ohio, Com. March 4, 1884

6. COMMON CARRIERS—EXEMPTION FROM LIABILITY—NEGLIGENCE.
A ticket of a passenger on defendant's steamer provided that the defendant should not be responsible for the negligence of its mariners. *Held*, that it was not responsible for a loss of life caused by the negligence of its servants in a collision with another ship, the condition being binding. *Haight v. Royal M. I. P. Co.* Eng. Ct. of App. 49 L. T. N. S. 802.

7. CORPORATION—INSOLVENCY—UNPAID SUBSCRIPTIONS.
In case of the insolvency of a corporation unpaid and uncalled amounts due upon the capital stock cannot be attached by a judgment creditor of the corporation by means of an attachment execution; upon insolvency the uncalled and unpaid subscriptions constitute a trust fund, which will be administered for the benefit of all the creditors. *Brum's Appeal, Lane's Appeal*, S. C. Pa. Jan. 15, 1884; 14 W. N. C. 193.

8. COVENANT—TRADE—WHAT IS.
Upon a covenant by a lessee not to use the demised property for the purpose of any trade or business, *Held*, that the lessee could restrain the user of the premises as a home for working girls, even though it appeared that no profits were made, the payments made by the inmates being insufficient to pay the working expenses of the home. *Rolls v. Miller*, Eng. H. Ct. Ch. Div. 32 W. R. 386.

9. CRIMINAL LAW—LARCENY—TRICK.
H and another went to an inn, and paying for liquor put down half-a-sovereign, asking change. Then asking it back and putting down silver, while the other prisoner asked for a cigar, they so confused the barmaid that in the end they got 9s. 6d. of her money. On indictment for larceny: *Held*, that there being no intention of the barmaid to part with the possession of this money, a verdict of guilty was held to be right. *Reg. v. Hollis*, Eng. Cr. Cas. Res. 48 J. P. 120.

10. CRIMINAL PRACTICE — CONTINUANCE — PREJUDICE AGAINST ACCUSED.
Where the accused moved for a continuance, and in support of the motion offered affidavits alleging bitter and general prejudice against him throughout the county, in consequence of which, in the opinion of the affiants, a fair and impartial trial could not be had at that time. *Held*, not a good ground for a continuance. *Joyce v. Commonwealth*, S. C. App. Va. 8 Va. L. J. 180.

11. DIVORCE—CONVICTION OF CRIME—PARDON.
Where conviction of crime is ground for divorce, a pardon by the executive does not affect the libellant's right to a divorce. *Young v. Young*, S. C. Tex. Galveston Term, 1884.

12. EJECTMENT—TITLE UNDER TAX DEED—REGISTRY NECESSARY.
Until a tax deed is properly recorded the grantee therein has not such a right to the possession of the premises as will enable him to maintain ejectment therefor. *Hewitt v. Week*, S. C. Wis. Jan. 29, 1884; 18 N. W. Rep. 417.

13. EMINENT DOMAIN—ADDITIONAL BURDEN—TELEGRAPH.
The construction of a telegraph line upon a public highway is an additional burden thereon, for which an abutting owner may recover damages by way of compensation. *Board v. Barnett*, S. C. Ill. 17 Rep. 268.

14. EQUITY—INJUNCTION—FOREIGN JUDGMENT.
A bill in equity for an injunction against the use, in this State, of a judgment rendered in another State, can not be maintained on the ground that the judgment was obtained by the false and fraudulent testimony of the prevailing party. *Metcalf v. Gilmore*, S. C. N. H.; Reporter's Advance Sheets.

15. EVIDENCE—INCONSISTENT TESTIMONY—ESTOPPEL.
In a suit against the collector for illegally exacting duties upon imported goods the merchant appraiser will not be permitted to testify in contradiction of the report which he made to the collector. He is not a competent witness to prove his own neglect of duty. *Oelberman v. Merritt*, U. S. C. C. S. D. N. Y. Feb. 4, 1884; 17 Rep. 265.

16. EVIDENCE — PRIVILEGED COMMUNICATION — STATEMENTS MADE TO PROSECUTING ATTORNEY —ACTION FOR SLANDER.
A communication made to a State's attorney, in Illinois, his duty being to "commence and prosecute" all criminal prosecutions, by a person who inquires of the attorney whether the facts communicated make out a case of larceny for a criminal prosecution, is an absolutely privileged communication, and can not, in a suit against such person, to recover damages for speaking words charging larceny, be testified to by the State's attorney, even though there be evidence of the speaking of the same words to other persons than such attorney. *Vogel v. Gruaz*, U. S. S. C., Feb. 4, 1884, 4 S. C. Rep., 12.

17. FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP UNNECCESSARY.
The creditors of a certain debtor, by process out of the Federal Court, attached property in the hands of the complainant, who claimed title to it in his own right. The goods were returned to him upon his giving a delivery bond to the marshal conditioned upon his producing the goods at a day named, or paying their value. Complainant having disposed of the goods, and paid their value to the marshal, brought a bill for an injunction to prevent the money so paid in, which he claimed as his own, from being distributed to the creditors in the original suit. *Held*, that, being unable to maintain replevin against the marshal in the State court by reason of the goods being in the custody of the law in a Federal court, the complainant had no adequate legal remedy, and was entitled to his injunction without regard to his citizenship. *Krippendorf v. Hyde*, U. S. S. C., Jan. 28, 1884, 3 S. C. Rep., 27.

18. FEDERAL COURTS—JURISDICTION—REMOVAL OF CAUSE — DISSOLVING INJUNCTION OF STATE COURT.
A circuit court of the United States has no revisory power over the chancery court of a State, but when, before removal of a cause from the State court, an *ex parte* preliminary injunction has

been granted, it may in a proper case dissolve such injunction. *Sharp v. Whiteside*; *Whiteside v. Sharp*, U. S. C. C., E. D. Tenn., 19 Fed. Rep., 156.

19. INDICTMENT—DEFINITENESS OF CHARGE.
In an indictment for using abusive and obscene language, the language must be set out *verbatim et literatim*, and the omission is fatal. *Stener v. State*, S. C. Wis. Jan. 29, 1884, 6 Wis. L. N., No. 137.

20. INSURANCE—CO-OPERATIVE LIFE—LEGION OF HONOR—CONTROL OF INSURED OVER CERTIFICATE.
Certificates of American Legion of Honor are under the control of the insured, and he may exercise a change of beneficiaries by will. *Splawn v. Chew*, S. C. Tex., 3 Tex. L. Rev., 23.

21. INSURANCE—LIFE—DISTRIBUTION OF LOSS.
A life policy was payable to the insured's "wife and children." *Held*, that there being three children (one of them by a divorced wife), the wife and children each took one-fourth. *Felix v. Ancient Order, etc.*, S. C. Ind., 13 Ins. L. J., 234.

22. LIBEL—PRIVILEGED COMMUNICATION.
Communication from county residents to license commissioners, containing libelous statements about the character of plaintiff's place, and requesting them to deny his petition for a license is privileged. *Wilcox v. Howell*, Can. H. Ct. Q. B. Div.; Feb. 16, 1884.

23. LIBEL—PUBLIC OFFICER—PERSONAL TRAITS.
A charge against a person who holds an elective office that he is untruthful, profane, or a libertine, does not relate to him in his official capacity, but to his character as a man. *Commonwealth v. Wardwell*, S. J. C. Mass. 17 Rep. 273.

24. MORTGAGE—AFTER ACQUIRED TITLE.
The lien of a mortgage upon a lease-hold estate continues upon any subsequent renewals of the lease. *Wunderlich v. Wipfler*, S. C. N. Y.

25. MUNICIPAL BONDS—DEFENCE—BONA FIDE HOLDER—OVERDUE COUPONS—NOTICE.
As against a *bona fide* holder for value of municipal bonds mere irregularity, fraud or misconduct of the agents of the municipality is no defense to an action thereon; and the mere fact that at the time a bond was purchased it had attached to it several overdue and unpaid coupons will not *per se* be sufficient to put the purchaser on inquiry, or raise the presumption of *mala fides* on his part. *Ronede v. Jersey City*, U. S. C. C. D. N. J.; 17 Rep. 263.

26. NEGLIGENCE—CONTRIBUTORY—PER SE.
The protrusion of the arm out of a car window is contributory negligence *per se*. *Dun v. Seaboard R. Co.*, S. C. App. Va. Feb. 14, 1884; 8 Va. L. J. 163.

27. NUISANCE—HOUSE OF PROSTITUTION.
One who continues to let a house, knowing that the same is being used for purposes of prostitution is liable to those living about the same as for a nuisance. *Marson v. French*, S. C. Tex.; 3 Tex. L. Rev. 127.

28. PARTNERSHIP—DORMANT—PRESUMPTION.
If there are two firms of the same name in the same community, each consisting of the same persons, but each engaged in different kinds of business, one of which contains a dormant partner and the other does not, and suit is brought on a promissory note for borrowed money bearing the signature of the common firm name, the presumption is, that it is the note of the firm not containing the dormant partner. *Fosdick v. Van Horn*. S. C. Ohio, Feb. 5, 1884; 5 Ohio L. J. 135.

29. PATENT LAW—SURVIVAL OF ACTION—DEATH OF PATENTEE.
A cause of action for the infringment of a patent survives, upon the death of the patentee, to his representatives. *Ill. Cent. R. Co. v. Turrill*, *Mich. S. & N. I. R. Co. v. Same*, U. S. S. C. Jan. 28, 1884, 4 S. C. Rep. 5.

30. REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—JOINT TORTFEASORS.
In a proceeding either in law or equity, wherein two or more are charged with a tort e. g. a fraudulent misappropriating of trust funds, and the proceeding might have been brought against each separately, if the requisite diversity of citizenship exists between the plaintiff and any of the defendants, as to them the suit may be removed to the Federal Court. *Boyd v. Gill*; *Cutter v. Whittier Nott v. Clews*; *Perkins v. Dennis*, U. S. C. C., S. D. N. Y. Dec. 14, 1883; 19 Fed. Rep. 145.

31. SURETYSHIP—EXTENSION TO PRINCIPAL—HUSBAND AND WIFE—DISCHARGE.
Where a husband and wife give a mortgage upon her separate property to secure his debt, a binding extension granted to the husband without the wife's consent discharges the mortgage upon her property. *Eisenberg v. Albert*, S. C. Ohio Com., March 4, 1884.

32. WILL—CONSTRUCTION—DISPOSITION OF INCOME.
The testator gave a legacy to such children of B, as should be living at the death of his own grandson. *Held*, that, until that event, the income should not be accumulated, but should go to the residuary legatee. *In re Judkins*, Eng. H. Ct. Ch. Div., Feb. 1, 1884.

33. WAIVER—PAYMENT—DAMAGES.
One may pay a contractor the contract price for building a house, and then bring suit against him and his sureties for damages for breach of the contract. Such payment does not operate as a waiver of the breach. *Halleck v. Bresnahen*, S. C. Wyoming, 2 W. C. Rep., 60.

34. WILL—TENANTS IN COMMON—JOINT EXECUTION.
Tenants in common of real estate who were also owners, severally, of personal property, may dispose of the same by will by uniting in a single instrument, where the bequests are severable and the instrument is not in the nature of a compact, but is, in effect, the will of each, revocable by him, and subject to probate as such several will; and where the instrument is not offered for probate until the death of all executing it, the same may then be admitted to probate as the will of each and all such persons. *Betts v. Harper*, S. C. Ohio, 11 Week. L. B., 94.

35. WILL—TESTAMENTARY CAPACITY—AMOUNT NECESSARY.
An instruction that "the highest degree of mental soundness is required in order to constitute capacity to make a testamentary disposition of property" is properly refused. Such a degree is not required. *Whitney v. Twombly*, S. J. C. Mass. 7 Mass. L. Rep., Feb. 14, 1884.

36. WILL—CONSTRUCTION.
Testator gave to each of his sisters and his brother the interest on $10,000 to be paid to them during

their lives, and on their death to be divided among their children. The trustees invested the money in city sixes. On the death of one of the sisters the trustees sold the city sixes at a large advance realizing over $12,000. *Held*, that only $10,000 was to be divided among the children, and that the excess went to the residuary legatee. *Middleton's Appeal*, S. C. Pa., 41 Leg. Int., 75.

37. WILL—LIMITATION AFTER DEVISE OF FEE WITH ABSOLUTE POWER OF DISPOSAL—PRECATORY TRUST.

1. A devise to C "to be held, used, and enjoyed by him his heirs, executors, administrators and assigns forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death the same or so much thereof as he shall not have disposed of by devise or sale, shall descend" to certain other parties named in the will in certain proportions fully set out therein, confers an estate in fee-simple with an absolute power of disposition on C, and the limitation over is void. 2. Whenever the objects of a supposed recommendatory trust are not certain or definite, whenever the property to which it is to attach is not certain or definite, whenever a clear discretion or choice to act or not to act is given, and whenever the prior disposition of the property import absolute and uncontrollable ownership, words of recommendation or request will not create a trust. *Howard v. Corusi*, U. S. S. C. Jan. 7, 1884, 3 S. C. Rep. 575.

QUERIES AND ANSWERS.

QUERIES.

22. Does the fraudulent alteration of a mortgage note destroy the validity of the mortgage?

LEX.

23. A executes to B a negotiable note, without any consideration. B endorses it, before maturity, and A is compelled to pay it. Can A recover from B the sum paid to discharge the note? Please cite authorities.

H.

24. In a suit brought by A against B for money had and received, it appears that in a prior suit brought by C the indorsee of B of a note made by A set up that such transfer took place after maturity, and was therefore subject to an offset of the same claim as was now in suit. The parties went to trial, and C recovered judgment for the full amount of the note. Now was this verdict such a settlement of the question as to the propriety of the claim that B can now set it up as *res adjudicata*. Cite authorities.

Hillsboro, Ohio. LEX.

25. In Maine, New Hampshire, and, I believe, Indiana, there are statutes requiring the surviving partner of a firm dissolved by the death of the other partner, to file an inventory of the firm assets, and give bond within a prescribed time. Are there other States in which similar statutes have been enacted. If so, what cases have passed upon the power of the survivor to sell or charge with lien the firm assets by way of preference? P.

26. A bargained with B to buy his farm, provided the title should prove good. B executed warranty deed to A and delivered it to a neighbor until A could get an abstract and satisfy himself about the title. A then employed a regular abstractor to furnish him an abstract to date. Abstractor did so, appending the usual certificate that said abstract showed "all the instruments of record affecting the within described real estate A paid him his fee, went home, accepted the deed from B, and, paid for the land. It afterward developed that B had but one fifth interest, and C, the remainder of the title. The instrument showing C's title was of record two months prior to the making of the abstract. A is compelled by C to quit or buy his interest. A buys. Will an action lie to recover from the abstractor? B, is insolvent, and lives in another State. Would A be compelled to exhaust B, before suing the abstractor? If not, should he plead and show the insolvency of B? Please cite authorities in point, and particularly decisions of Missouri.

Russelville, Ark. O.

QUERIES ANSWERED.

Query 9. [18 Cent. L. J. 139.] A brings suit as a railway company for damages for tort committed by its conductor; whilst suit is pending, and before any trial, the road goes into the hands of a receiver. *Quære.* Must the receiver be made party defendant? Could execution issue against the property of the road? If the judgment is partly for punitory damages, will the receiver be responsible for that? G.

Corsicana, Tex.

Answer. A receiver, appointed since the commencement of a suit against a corporation, will not be made a party defendant at the suggestion of the plaintiff; but can defend, if he desires, upon application therefor. Ins. Co. v. Jayne, 7 Cent. L. J., 67; s. c., 87 Ill. 199. The appointment of a receiver has been said to be in the nature of an equitable execution; his possession is the possession of the court, all property which is in his actual possession, or which he is appointed to receive is *in custodia legis*. Davis v. Gray, 16 Wall. 217; 10 Cent. L. J. 32; s. c., 8 Rep. and 78 Ky. 62; 30 N. J. Eq. 311. Therefore it is not subject to execution, 66 Pa. St. 160; Freeman on Executions, sec. 129 and citations. As a judgment is always held to be merger of the subsequent cause of action, and is an entirety, the receiver, if he can be required to pay any part of it, out of the property in his hands, could be required to pay all of it.

Denver, Colo. JAS. H. BROWN.

Query 19. [18 Cent. L. J. 199.] Has the word "emoluments," as used in connection with fees or salary of an officer, ever been judicially defined?

SHY ANN.

Answer. See Queen v. Postmaster General, 1 Q. B. Div. 658.

NOTES.

——Ex-Gov. Butler has a profound disregard for petitions. "You could get in Massachusetts 10,000 men to sign a petition to have me hanged," he says, "and half of them would sign a petition to have themselves hanged, without knowing what they were doing."